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NORTON ROSE FULBRIGHT

Essential pensions news

Updater

May 2017

Introduction

Essential Pensions News covers the latest pensions developments each month.

General election June 8, 2017: implications for pensions law

The leading political parties have now published their manifestos, and we have outlined on the follwing page the key policy statements and pledges relating to pensions law. We will be publishing a more in depth analysis as our May 2017 briefing.

Issue	Conservative	Labour	Liberal Democrats
State Pension Age (SPA)	Continued commitment to the gradual equalisation between men and women to age 65 by September 2018 and to age 66 by September 2020.	A new review of SPA will be conducted, 'specifically tasked with developing a flexible retirement policy ... to reflect wide variations in life expectancy and the arduous conditions of some work'.	No specific comment.
'Triple lock' for State pension	Triple lock retained until 2020, following which a 'double lock' will apply, under which State pensions will rise by the higher of earnings and inflation (without the 2.5% minimum uplift, as currently).	Triple lock guaranteed throughout the next Parliament (until 2022), although a previous commitment had been to retain it until 2025.	Triple lock guaranteed until 2022.
Protecting members' benefits	Broader powers for TPR to disqualify company directors, issue 'punitive fines', and power to stop corporate deals threatening scheme solvency.	Review of the current corporate takeover regime to protect scheme members, particularly where a business is identified as 'systemically important'.	A commitment to 'abolish remaining marriage inequalities in pensions', which seems to refer to the current position where it is lawful for schemes to provide surviving same sex partners' benefits in relation to post-five December 2005 service only.
Future pension provision	Extend the availability of auto-enrolment to the self-employed. Continued support for the Lifetime ISA. Establish sovereign wealth funds to encourage infrastructure investment. Protecting benefits in the 'gig' economy. Means testing of Winter Fuel Payments.	Immediate review of the Mineworkers' Pension Scheme and British Coal Scheme arrangements for the sharing of surplus between the Government and members. Additional steps to protect nuclear workers' benefits, including any future decommissioning. Universal maintenance of Winter Fuel Payment and free bus passes.	Establish a single flat rate of pensions tax relief. Raise threshold of employee NICs to the income tax threshold 'while protecting low earners' ability to accrue pension and benefit entitlements'. Means testing of Winter Fuel Payments. Maintain universal free bus passes.

View the Conservative Manifesto.

View the Labour Manifesto.

View the Liberal Democrats' manifesto.

The Pensions Regulator has published its annual funding statement for 2017, aimed at trustees and employers of defined benefit pension schemes

Of interest to all defined benefit (DB) schemes, is the Pensions Regulator's (TPR's) latest annual funding statement, in which it outlines a more proactive approach to ensuring DB scheme members receive the benefits they are entitled to. Proposed actions include intervening early before recovery plans are submitted.

The statement sets out TPR's expectations of trustees, drawing on its own guidance and policy documents to set out a series of actions for all DB schemes, with a focus on 'stressed schemes'. The statement indicates a more prescriptive approach to the valuation process, emphasising the need to take appropriate advice and promoting early engagement with TPR.

With the recent BHS saga in mind, it is interesting to note that the statement specifically addresses the need to balance the needs of the scheme and the shareholders, stating that TPR is likely to intervene where 'we believe schemes are not being treated fairly'.
Given the criticism TPR received during the House of Commons committee proceedings on BHS, it appears that TPR will be looking much more closely at recovery plans and payments to shareholders in the future.

New obligations for 'stressed schemes'

Using its risk categories as a measurement, TPR states that its analysis shows that five per cent of schemes in the 2017 valuation cycle have an employer which is 'tending to weak' or 'weak'. The effect of this places the employers at risk of either becoming unable, or already being unable, to adequately support the scheme. TPR recognises that 'the least detrimental impact for members' benefits in these circumstances may be for the scheme to continue'. However, it is aware that this may have the effect of 'PPF drift' that is, where a scheme's PPF liabilities grow each year as more members reach normal retirement age. The parallel risk is that this increases ongoing funding costs for the scheme's employer.

TPR notes that many of these employers will not be 'inevitably insolvent' within the next 12 months and so could not apply to TPR to sever the scheme from the employer using a regulated apportionment arrangement.

In future, TPR will require trustees of 'stressed schemes' to show evidence they have taken appropriate measures, such as

- Closing the scheme to future accrual if this has not already been done
- Checking the strength of the sponsoring employer
- Considering whether any payments of dividends made or due to be made limit the ability of the employer to support the scheme and invest in sustainable growth
- Identifying scheme risks and seeking to manage them
- Where scheme rules allow, considering whether the scheme should be wound up

Focus on scheme valuations

TPR confirms that it intends to take a tougher approach when schemes fail to submit their valuations on time (in 2016 approximately a tenth of DB schemes completed their scheme valuation later than the prescribed 15-month deadline). If schemes anticipate they cannot meet the deadline they should contact TPR, as it is more likely to take enforcement action in relation to a breach if delays could have been predicted, or where trustees do not engage with the process. TPR also calls on trustees to 'seek and duly consider robust actuarial advice' from their scheme actuary on the valuation assumptions.

Balancing the scheme and the shareholders

TPR emphasises that it is likely to intervene in schemes where it considers that 'schemes are not being treated fairly'. For instance, it will look more closely where it suspects that recovery plan end dates are being extended unnecessarily or where dividend payments to shareholders are being prioritised and this restricts scheme contributions.

We will be publishing a detailed briefing on TPR funding statement in June 2017.

Comment

This statement represents a clear indication from TPR that it intends to take a much closer look at how schemes are managing risk, covenant and funding governance, and schemes must take steps appropriate to their circumstances. TPR's view is that contingency planning is appropriate for all schemes, not just those at risk. In reaction to recent high profile corporate failures, TPR intends to intervene early where a scheme is not being treated 'fairly'.

View the funding statement.

Regulator’s 2017-20 corporate plan confirms focus on master trust and more proactive intervention

Of widespread interest is the publication by TPR of its corporate plan for 2017-20, setting out its eight priorities for the next three years. Of these, the most significant are

- Master trusts. TPR expects that implementing the new master trust regulation and authorisation regime, as set out in the Pension Schemes Act 2017, will take up a significant proportion of its workload for the 2017-18 year. TPR aims to set up a dedicated team to supervise master trusts when the new framework comes into force, due to be in October 2018. The team will supervise the security and governance standards of master trusts to ensure that they provide good service for members and achieve authorisation where necessary. TPR intends to develop a code of practice and support for trusts intending to apply for authorisation to help them satisfy the new requirements.

- Defined benefit (DB) schemes. TPR intends to step up its ability for efficient intervention where DB schemes are underfunded or there is a suspicion of avoidance activity. TPR highlights using the full range of its available resources and powers in ‘frontline regulation teams’. It hopes to increase the proactivity of its approach to casework by improving its early identification of cases that present the biggest risk to members and intervening before recovery plans are submitted.

- Trusteeship. In relation to its long-term strategy to improve trustee standards, TPR notes that while scheme governance has improved, such progress is not universal. TPR’s communication with trustees will be prioritised, clarifying their responsibilities and providing more reference enabling trustees to meet TPR’s expected standards. TPR foresees increased intervention and regulatory action where there is a shortfall in trustee governance standards, with additional focus on trustee chairs and professional trustees.

The further stated priorities of TPR are

- The successful completion of the remaining stages of auto-enrolment

- Driving up standards of record-keeping and data maintenance

- Clarifying the codes and guidance in order to maximise impact

- Developing an enhanced approach to regulation, improving TPR’s effectiveness and efficiency

- Creating high performance teams to deliver the above objectives

View the Corporate Plan.

TPR and auto-enrolment: shoe retailer pays £40,000 escalating penalty for non-compliance with employer duties

TPR has published details of action taken against a high street shoe retailer that resulted in it collecting over £40,000 in civil penalties for breaches of the employer auto-enrolment duties under the Pensions Act 2008.

After passing its staging date on May 1, 2014, Johnsons Shoes Company failed to provide TPR with a declaration of compliance by the statutory deadline and TPR issued a compliance notice. When Johnsons still failed to comply, TPR issued fixed, and then escalating, penalty notices. Although Johnsons eventually provided its declaration of compliance and paid the £400 fixed penalty in December 2015, it refused to pay the escalating penalty. This increased by £2,500 a day and by the time it stopped accruing had reached £40,000.

TPR ultimately issued proceedings in the County Court seeking recovery of the unpaid escalating penalty. Johnsons challenged the Regulator's power to issue the penalty notice, but TPR applied to have the defence struck out on the basis that it had no reasonable grounds of success. TPR also argued the defence was an abuse of process, as the correct means of challenging an escalating penalty notice was to apply to TPR for a review and thereafter to the First-tier Tribunal. Johnsons had done neither within the required timeframe.

Before the strike-out application was heard, Johnsons agreed to pay the outstanding penalty and meet TPR's £2,000 court fee for issuing the claim. TPR stated that if an employer fails to co-operate fully with its enquiries and investigations, it will use all the powers at its disposal to ensure compliance with the statutory auto-enrolment duties.

HMRC publishes newsletter 86 – position on contribution of assets clarified and a warning on 'scheme pays' where the tapered annual allowance applies

On April 21, 2017, HM Revenue & Customs (HMRC) published edition 86 of its regular pension schemes newsletter.

This issue includes clarification of HMRC's position in relation to *in specie* contributions (contribution of assets) to registered pension schemes, which it says has not changed. Although changes were made to the guidance during the move to the new Pensions Tax Manual, HMRC states that it should not be read as legitimising *in specie* contributions, as this would be contrary to legislation. HMRC states that it will examine transactions where it is concerned that the transfer of assets does not give effect to a cash contribution.

HMRC has also updated its online guidance on the application of the 'scheme pays' regime, which is complex, particularly in situations where the tapered annual allowance applies to a member. Where a scheme offers help in the form of 'scheme pays' on payment of the annual allowance charge only at the statutory level of up to £2,000, it is possible that a member may have to pay the balance of a substantial annual allowance charge from his or her own pocket. A detailed example is provided in the guidance.

Also included are several reminders for scheme administrators relating to scheme filing deadlines, and updates to various online forms.

View the newsletter.

HMRC publishes Newsletter on Scottish rate of Income Tax

On May 12, 2017 HMRC published a newsletter dedicated to the issue of the Scottish rate of income tax.

The introduction of the Scottish rate of Income Tax means that pension scheme members receive tax relief on their contributions based on their residency tax status. For scheme administrators operating relief at source pension schemes, if the Scottish rate of Income Tax differs from the rest of UK rate, this affects the amount of tax relief given to each member. From January 2018, HMRC will confirm to pension scheme administrators operating relief at source pension schemes the residency tax status of individual scheme members.

Where a scheme administrator operates a relief at source pension scheme, an annual return of individual information by July 5 each year. This annual return contains information about each member, the contributions made and tax relief given.

HMRC will use the data submitted on the previous year's annual return of individual information to tell administrators the correct relief at source rates for the following tax year, so that scheme members receive the correct amount of tax relief.

View the newsletter.

Finance Act 2017 – fast tracking omissions and pensions implications

The Finance Bill 2017 completed its second reading in the House of Lords and all remaining stages on April 26, 2017. It received Royal Assent on April 27, 2017 to become the Finance Act 2017.

The Bill was fast-tracked through the legislative process in light of the June 8, 2017 general election and was in revised form after significant amendments and deletions were tabled on April 25, 2017 due to lack of Parliamentary time.

Pensions-related measures surviving in the Act

The following provisions are included in the Act

Clause nine and Schedule three – overseas pensions

- Measures aligning the tax treatment of foreign pensions and lump sums paid to UK residents with that afforded to UK pensions and lump sums

- The extension of the period over which UK tax charges arise on payments from funds that have received UK tax relief from five to ten years

- Section 615 scheme closure to new savings

- Alignment of the tax treatment of funds transferred between registered pension schemes and the inclusion of payments of foreign pensions and lump sums fully into tax for UK residents.

In addition, a number of amendments have been made and on April 20, 2017, HMRC published additional information for members on pensions tax for overseas pensions. This includes a summary of the provisions relating to section 615 schemes and an explanation of payments that will not lead to the loss of favourable tax treatment under that section.

Clause ten and Schedule four – offshore transfers

The new overseas transfer charge announced at the 2017 Spring Budget will apply to

- Transfers from a registered pension scheme to a qualifying recognised overseas pension scheme (QROPS) requested on or after March 9, 2017, unless certain conditions apply
- An onward transfer on or after April 6, 2017 from one QROPS to another within five years of the original transfer date, unless the transfer is excluded

Amendments were agreed to clarify the operation of the overseas transfer charge and ensure that the tax rules relating to the charge do not extend further than intended

Pensions-related measures no longer included

The following two pensions-related provisions are not included in the Act

- Clause 12 of the Bill: measures increasing the income tax exemption to £500 per member for employer-arranged pensions advice in any tax year
- Clause 16 of the Bill: measures reducing the money purchase annual allowance (MPAA) from £10,000 to £4,000

The regulations under which members can use up to £500 per tax year on three occasions from their DC funds to pay for regulated financial advice are unaffected and came into force on April 6, 2017, and this has caused some confusion.

Comment

The omission of the reduction of the MPAA to £4,000 was a surprise. However, this is expected to be temporary and it is predicted that the measure will be reinstated if the Conservatives form the next Government. That said, it is not clear whether on re-introduction this measure would be backdated to April 6, 2017, and the uncertainty makes advising any affected members very difficult.

Pension Schemes Bill 2016-17 receives Royal Assent

The Pension Schemes Bill 2016-17 received Royal Assent on April 27, 2017 to become the Pension Schemes Act 2017 which, amongst other things, is to introduce a new regime for the authorisation of master trusts. Initial consultations on regulations made under the Act are expected to begin in Autumn 2017, with the detailed provisions scheduled for implementation from October 2018.

The key provisions of the Act include

- Authorisation. Master trusts will be permitted to operate only once they have authorisation from the TPR. The scheme trustees must make the application for authorisation, which must be accompanied by certain documents, including the latest accounts for the scheme and the scheme funder, a business plan prepared by the scheme strategist and a ‘continuity strategy’. Each scheme will need to meet prescribed criteria in order to be authorised. Schemes operating without authorisation will be subject to fines in line with section ten of the Pensions Act 1995.

- Supervision. Having obtained authorisation, ongoing requirements will apply, including the submission of annual accounts and periodic supervisory returns to TPR. TPR must also be notified when ‘significant events’ occur.

A clause in earlier drafts of the Bill relating to a scheme funder of last resort, which would have applied where a master trust was unable to meet its wind-up costs, was dropped during the Bill’s committee stage as the Government considered that the new master trust regulatory regime provides sufficient protection.

- Cap on early exit charges. Further provisions facilitate the operation of the pensions flexibility regime by implementing a regulation-making power capping early exit charges. This will allow a members of a scheme which does not offer the full range of pension flexibilities to make a penalty-free transfer to an alternative scheme.

Employer debt: DWP consults on draft regulations introducing new deferred debt arrangements

Of interest to all schemes providing defined benefits are the draft Occupational Pension Schemes (Employer Debt) (Amendment) Regulations 2017, published by the Department for Work and Pensions (DWP) on April 21, 2017 for consultation. The regulations are due to come into force on October 1, 2017 and the consultation runs until May 18, 2017.

The proposed draft regulations will amend the Occupational Pension Schemes (Employer Debt) Regulations 2005 (the Employer Debt Regulations). The Employer Debt Regulations affect multi-employer defined benefit (DB) schemes and the proposed changes will introduce a new arrangement for dealing with employer debts, referred to as a ‘deferred debt arrangement’ (DDA).

A DDA will allow an employer to defer the requirement to pay an employer debt on ceasing to employ an active member, provided that a number of conditions are met.

Background

In a multi-employer DB pension scheme, an employer debt is triggered under section 75 of the Pensions Act 1995 in three circumstances

- When the scheme starts to wind up

- When the scheme’s principal employer becomes insolvent

- When a participating employer stops employing any active members and at least one other employer continues to do so (that is, an ‘employment-cessation event’ has occurred)

Employers had reported several difficulties under the current regime, with employment-cessation events triggering section 75 debts sometimes occurring inadvertently and facing significant financial difficulties on inheriting orphan liabilities in so-called 'last man standing' schemes. Some features of the current regime had also caused difficulties for employers such as charities participating in multi-employer schemes with non-associated employers.

In March 2015, the DWP issued a call for evidence on whether the Employer Debt Regulations should be amended for non-associated employers, and canvassed views on three further possible easements

- Providing greater flexibility over the period when an employer debt must be paid
- Amending the definition of an employment-cessation event to exclude ceasing to employ active members, where the employer in question is still solvent
- Switching the calculation basis for an employer debt triggered on an employment-cessation event from the buyout basis to some other measure, for example, the scheme-specific funding basis

The DWP's response was published on April 21, 2017, together with draft amending regulations. Some respondents considered that employers within associated multi-employer schemes were more likely to be able to use one of the existing arrangements currently available to manage employer debt and as a result, were less likely to be required to pay an employer debt in full at the point of exit. In contrast, employers within non-associated multi-employer schemes were often unable to take advantage of these arrangements and there was anecdotal evidence that a number of employers had been driven into insolvency by employer debts.

The draft regulations

It is proposed that the DDA will

- Sit alongside other easements for managing employer debts
- Be available to both associated and non-associated employers, as well as employers already in a period of grace
- Cease in certain specified circumstances (such as where the deferred employer employs an active member or restructures)
- Be determinable by the scheme trustees, in certain circumstances, by giving notice to the deferred employer

The following conditions must be met for a DDA to be available

- The regulatory 'funding test' must be met
- The scheme must not be in a PPF assessment period
- The trustees must consent to the DDA

The draft regulations also make a number of technical amendments to the employer debt regulations, such as clarifying what will happen when there have been two successive employment-cessation events.

View the draft regulations.

European Commission adopts legislative proposal to amend and further extend pensions funds' clearing exemption

In our January 2017 update, we reported that the European Commission (EC) had adopted a Delegated Regulation amending the European Market Infrastructure Regulation (EMIR) as regards the extension of the transitional periods related to pension scheme arrangements (PSAs).

EMIR applies to pension schemes which are subject to the IORP Directive in respect of any over-the-counter (OTC) derivatives in their investment portfolios. Where EMIR applies, trustees may need to clear relevant trades under the new centralised clearing structures. The EC then extended the transitional relief for PSAs from central clearing for their OTC derivative transactions until August 16, 2018. Without the extension, PSAs would have to source cash for central clearing. As PSAs do not hold significant amounts of cash or highly liquid assets, imposing central clearing requirements would require very far-reaching and costly charges to their business model and this could ultimately affect pensioners' income.

On May 4, 2017, the EC adopted a legislative proposal for a Regulation amending EMIR, together with a Communication outlining future legislative proposals that it intends to present in June 2017. The proposal extends the current temporary exemption from the clearing obligation for pension funds for a further three years. It also provides a mechanism for the EC to extend the exemption by two years.

Feedback is sought on the legislative proposal within a period of 8 weeks after the proposal is made available in all EU languages, although as at May 11, 2017, the legislative proposal was available only in English.

British Airways PLC v Airways Pension Scheme Trustee Limited [2017] – BA loses High Court case over trustees' discretionary pensions increase

British Airways (BA) has lost its legal challenge against the trustees of the Airways Pension Scheme (APS) to make additional, discretionary increases to its 26,000 members' benefits.

In the High Court judgment running to 164 pages and was published on May 19, 2017. The legal action was initiated by BA in 2013, in which it challenged a move by the APS trustees in 2011 using their unilateral amendment power, to change the scheme's rules to allow them to make discretionary payments to pensioners while the scheme was in deficit, in addition to the standard annual inflation rises.

BA also challenged a subsequent trustee decision to award a 0.2 per cent discretionary payment in December 2013, amounting to £12 million, branding the decision 'perverse and irrational'.

The High Court ruled that the trustees' actions were valid.

The case arose when the inflationary increase rule in the APS was switched from the Retail Prices Index (RPI) to the Consumer Prices Index (CPI). This was expected to deliver cost savings to BA, but lead to less generous annual pension rises for members. The trustees used their discretionary power to award a 0.2 per cent discretionary increase, which was half of the difference between RPI and CPI.

Morgan J held that the trustees' decision to award the 0.2 per cent discretionary increase 'did not involve the making of a benevolent or compassionate payment' not was the payment beyond the scope of the trustees' power.

BA is considering whether to appeal the decision.

Comment

The rules of the APS are unusual in that the trustees had a unilateral amendment power. In the majority of schemes, amendments may only be made subject to the employer's consent.

The decision comes in a climate where the Government is coming under increased pressure to allow the sponsors of DB schemes to apply less generous annual inflation increase factors to members' benefits.

Given the unusual power in the trustees' hands under the APS rules, this case is unlikely to pave the way for more discretionary increase payments by other trustee bodies.

In the judgment, the High Court said BA's 'very wide-ranging' challenges had resulted in a 'lengthy and expensive trial'.

High Court: successful summary judgment application against professional negligence claims – Earnshaw v Prudential Assurance Company Limited [2017]

The availability of summary judgment

Summary judgment is a procedure by which the Court may decide a claim or a particular issue without a full trial. The advantage for the applicant is that it provides an opportunity for a case to be determined at an early stage and at a short hearing, therefore saving time and costs.

Under the Civil Procedure Rules, the Court may give summary judgment for a party (who can be the claimant or defendant) on a whole claim or on a particular issue if there is no real prospect of success and there is no other compelling reason why the case or issue should be heard at a full trial.

Background

In this case, the High Court ruled that summary judgment be given for Prudential Assurance Company (Prudential) in its application against certain parts of a professional negligence claim regarding the Job Earnshaw & Bros Limited Staff Pension Scheme (the Scheme). The Scheme's trustees and employer claimed damages in contract and negligence in respect of alleged breaches of duty by Prudential while providing administration, documentation and actuarial services over several years.

Prudential brought the summary judgment application in respect of two parts of the claim, relating to allegations about the wrongful payment of unreduced early retirement pensions and errors in respect of defective equalisation of normal retirement dates.

The early retirement claim

Under the rules of the Scheme, a member's early retirement required the consent of the Scheme's employer. The trustees then had a discretion as to whether the amount of pension should be reduced for early payment. The Court accepted Prudential's case that the early retirement claim had no real prospect of success on the ground that the unreduced early retirement pensions had been payable in accordance with the rules of the Scheme, even on the facts alleged by the claimants. The trustees' discretion had to be exercised at the time of retirement, as the exercise of a discretionary trust power could not be backdated. The trustees had not imposed a reduction at the time of retirement and therefore unreduced pensions had been correctly paid. The early retirement part of the claim had no real prospect of success and there was no compelling reason for it to be dealt with at a trial.

The equalisation claim

The claimants' case was that Prudential had made errors in respect of the date on which the benefits of male and female Scheme members were equalised as a result of the decision in *Barber v Guardian Royal Exchange* [1991], resulting in erroneous overpayments being made for approximately four years. The Court held that the claim was time barred as any errors had been made outside the fifteen year longstop period and did not constitute a continuing breach. The claimants therefore had no realistic prospect of success on this issue and there was no compelling reason why it should be disposed of at a trial.

Decision

In recording summary judgment in favour of Prudential on both parts of the claim, the Court provided a useful consideration of an administrator's role in implementing trustees' decisions under the early retirement provisions of scheme rules, and it was held that here the trustees had not in fact exercised their discretion in this regard.

The Court also outlined how limitation principles apply in these circumstances, holding that the alleged equalisation errors would not have constituted a continuing breach as, following a previous Court of Appeal judgment, there was no realistic basis for contending that there was a continuing duty. The complaint about equalisation was not one which realistically could have been spotted on a review as it arose from an error embedded in the Scheme rules after various rule changes in 1994.

The Court also considered Prudential's role as Scheme administrator in implementing trustees' decisions under the early retirement provisions of the Scheme rules and held that here the trustees had not in fact exercised their discretion in this regard. The decision also outlined how limitation principles apply in such circumstances in that the alleged equalisation errors would not have constituted a continuing breach. While it was unnecessary to rule on limitation defences regarding the early retirement issue, the Court examined how the latent damage provisions of the Limitation Act 1980, concluding that the evidence was sufficient to establish actual, constructive and constructive expert knowledge to start time running for these purposes.

Age discriminatory transitional provisions in pension schemes – can they be objectively justified?

In our March 2017 update, we reported on two cases in which an employment tribunal (ET) had considered discriminatory pension scheme provisions.

In *McCloud and Others v Lord Chancellor and Secretary of State and Another*, the ET held that discriminatory transitional provisions in the Judicial Pensions Regulations 2015, which mitigated the effect of compulsory pension reforms for older judges, could not be objectively justified and were therefore unlawful.

In *Sargeant and Others v London Fire and Emergency Planning Authority and Others*, the ET held that the transitional provisions for changes to the Firefighters' Pensions Scheme were objectively justifiable and therefore were not unlawfully discriminatory on grounds of age, race or sex.

It has now been confirmed that both decisions are to be appealed and that the ET has made an order to consolidate the two cases.

Pensions Ombudsman – Mr A: forfeiture and suspension – local authority could not withhold pension rights to recoup proceeds of former employee's fraud

The Pensions Ombudsman (PO) has given his determination in a complaint by Mr A against Enfield Council, holding that a local authority was not entitled to withhold a member's Local Government Pension Scheme (LGPS) benefits to recover debts owed where that member had fraudulently transferred £448,207 from one of the authority's bank accounts to his own.

The authority had sought to recoup the owed sums through withholding the figure from the member's pension benefits under the LGPS rules but the PO held that in order for the authority to rely on the relevant rule, the member must have been dismissed from his employment by reason of his fraudulent activity. As the member had been dismissed through redundancy prior to the fraud being uncovered, the authority could not rely on that rule to withhold the member's pension rights.

The PO directed the council to reconsider the method it intended to use to recover the debt within three months of the date of the determination.

Comment

This case highlights an interesting difference between general pensions law and the regulations governing the LGPS. Under the Pensions Act 1995 (PA 1995), the statutory prohibition on a person's pension rights being forfeited does not apply in the case of a person 'having incurred some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by the person'. There are no any additional requirements regarding the person's employment status under the PA 1995. By contrast, the LGPS regulations expressly limit the circumstances in which a person's pension rights may be forfeited to situations where the person has left local authority employment 'in consequence of a criminal, negligent or fraudulent act or omission on his part in connection with that employment'. The LGPS test is considerably narrower as far as the employer is concerned.

This determination shows that where fraud is committed against a local authority employer and successfully concealed by the employee until he has left employment, the employer cannot seek redress by repayment of the employee's pension. Although the PO noted that the local authority may still have recourse to other means of recovering the stolen funds, in practice these may not lead to anything like the recovery that pension forfeiture would have produced.

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